

# General Assembly of Maryland

State Department of Legislative Reference  
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Review of Statutes

## REPORT ON THE PROPOSED REVISION OF THE PROCUREMENT LAWS

### STATE FINANCE AND PROCUREMENT ARTICLE

#### I. GENERAL STRUCTURE AND HISTORY OF STATE FINANCE AND PROCUREMENT ARTICLE.

The proposed State Finance and Procurement Article Division II (Proposed Division II) completes the stylistic revision of the State Finance and Procurement Article. Proposed Division II concerns law dealing with State procurement. Division I, concerning law dealing with State finance, was enacted by Ch. 11, Acts of 1985.

A separate and unnumbered hardbound volume containing both stylistically revised Divisions I and II will be published after proposed Division II is passed. Division I comprises Titles 1 through 10, and, Division II will comprise Titles 11 through 17. Conforming to the organization, form, and numbering system used in previously revised articles, the volume will continue to be cited as the State Finance and Procurement Article. See Article I, § 25 of the Code.

#### II. PURPOSE AND SCOPE OF CODE REVISION.

Proposed Division II of the State Finance and Procurement Article is a product of the continuing revision of the Annotated Code of Maryland by the Division of Statutory Revision of the Department of Legislative Reference. The first revised articles were enacted at the First Extraordinary Session of 1973, and, to date, 16 revised articles and part of a 17th have become law: Agriculture, Commercial Law, Corporations and Associations, Courts and Judicial Proceedings, Education, Estates and Trusts, Family Law, Financial Institutions, Health--Environmental (now Environment), Health--General, Health Occupations, Natural Resources, Real Property, State Government, Tax--Property, Transportation, and the State Finance Division of State Finance and Procurement.

Until 1985, article preparation was supervised by the Commission to Revise the Annotated Code. Since then, this work has been performed by several article review committees, which determine the material to be included in each article as well as the method of organization and specific language of each article.

Each article proposed by an article review committee is a formal bulk revision, as mandated by the guidelines established in 1970, including improvement of organization, elimination of obsolete and unconstitutional provisions, resolution of inconsistencies and conflicts in the law, correction of unintended gaps or omissions in the law, deletion of repetitive or otherwise superfluous language, and general improvement of language and expression.

The basic thrust of the Division's work is formal; the primary purpose of its work is modernization and clarification, not making policy. Nonetheless, at some points in its work, the Division finds it necessary to touch on the substance of the law. In revising each of these sections, every reasonable effort has been made to ensure that the revision conforms as nearly as possible to the intent of the General Assembly, and all these revisions are highlighted in the appropriate revisor's notes. In other instances, the Division has noted fundamental policy issues that are beyond the purview of the revision process. In these cases, the Division has made no attempt to resolve the policy problems except to call them to the attention of the General Assembly through the revisor's notes, for possible action. The significant issues in both of these categories encountered by the Division in preparing the proposed State Finance and Procurement Article are highlighted in Section VII of this report.

The general rule of construction that the courts apply to a bulk revision was stated in Welch v. Humphrey, 200 Md. 410, 417 (1952):

"It is true that a codification of previously enacted legislation, eliminating repealed laws and systematically arranging the laws by subject matter, becomes an official Code when adopted by the Legislature, and, since it constitutes the latest expression of the legislative will, it controls over all previous expressions on the subject, if the Legislature so provides. However, the principal function of a Code is to reorganize the statutes and state them in simpler form. Consequently any changes made in them by a Code are presumed to be for the purpose of clarity rather than change of meaning. Therefore, even a change in the phraseology of a statute by a codification thereof will not ordinarily modify the law, unless the change is so radical and material that the intention of the Legislature to modify the law appears unmistakably from the language of the Code."

See also Bureau of Mines v. George's Creek Coal and Land Co., 272 Md. 143 (1974); Baltimore Tank Lines v. Public Service Commission, 215 Md. 125 (1957); Welsh v. Kuntz, 196 Md. 86 (1950); Crow v. Hubbard, 62 Md. 560 (1884); and Matter of Anderson, 20 Md. App. 31 (1974).

### III. FORM OF REVISOR'S NOTES.

In Section 2 of House Bill 1, which enacts Proposed Division II of the State Finance and Procurement Article, the statutory text is printed in all capital letters as though the language is entirely new. However, in many instances, a comparison of the revised law with the present law (described in the revisor's notes as the "former" law) will reveal that the proposed changes are merely stylistic improvements.

Each section or, in some instances, subsection of the revised law is followed by a revisor's note that identifies the present law that the new section or subsection replaces. These revisor's notes also explain all significant changes made in the revision process and, thus, provide a link between the present law and the revised law that replaces it by explaining, in detail, the relationship of the old law and the new.

The revisor's notes, although not part of the law, serve an important function in preserving the intent and substance of the present law. In Murray v. State, 27 Md. App. 404 (1975), the Court of Special Appeals recognized the importance of revisor's notes not only as a statement of the revisor's intent, but as a statement of legislative intent as well:

"These notes were part of the legislation enacting the revisions explaining to the legislators not only what changes were effected but what their expressed intention was in changing the wording." Murray v. State, 27 Md. App. at 409 (Emphasis in original).

In light of their importance as recognizable elements of legislative history, the revisor's notes in the third reading file bill will differ from those in the first reading file bill as little as practicable. Additional minor changes also may be made in them before publication by the Michie Company.

#### IV. CONTENT AND ORGANIZATION OF PROPOSED DIVISION II.

In the 1986 session, the General Assembly enacted Ch. 840, which substantially changed the general procurement laws of the State, then codified as Division II of the State Finance and Procurement Article (1985). Ch. 840 had a delayed effective date and, thus, became law on July 1, 1987.

During the same 1986 session, numerous other laws were enacted, effective July 1, 1986. Except in one instance, these laws made no reference to Ch. 840, particularly the extensive renumbering effected by that Chapter. Nonetheless, it was apparent that these laws were intended to be of more than limited duration. Therefore, the publishers of the Code have integrated these laws into the provisions enacted by Ch. 840. This consolidation, as evidenced in the 1987 Supplement to the State Finance and Procurement Article, has been used as the basis for this revision.

Title 11 contains definitions and provisions that apply to procurement by a unit of the Executive Branch of the State government. Title 12 contains provisions authorizing the Board of Public Works to supervise procurement and to delegate its authority over procurement. Title 13 contains provisions authorizing specific methods of source selection for specific procurement needs, the general procedures for procurement, and selection of architectural and engineering services. Title 14 contains preferences for purchases from small businesses, minority business enterprises, and resident bidders, purchases of recycled paper and low noise equipment, and sanctions against the Republic of South Africa. Title 15 contains provisions on the administration of procurement contracts by units of the Executive Branch of State government and the resolution of contract disputes under the Board of Contract Appeals. Title 16 contains provisions on the debarment of contractors from procurement contracts with Executive units for committing certain statutory offenses and provisions on the debarment of contractors from any contract with the State or a political subdivision for committing bribery or offenses related to bribery. Title 17 contains provisions on security required for construction contracts, prevailing wage rates, and steel procurement for public works.

## V. PREPARATION OF PROPOSED DIVISION II.

Each title of Proposed Division II was prepared initially by the staff of the Procurement Revision Review Committee. Donna B. Imhoff, Esquire, was the Division Supervisor. Other staff members who drafted portions of the Division were Andrew M. Lantner, Esquire, and Leslie D. Gradet, Esquire, who served as Division Supervisor at the beginning of the project. Additional staff members whose efforts contributed to the Division were Mr. Jeffery Meyers, Ms. Phyllis Helmick, Ms. Earline Johnson, Mrs. Angela Hampe, Mrs. Irene Martelli, and Mrs. Frances Pyle. As each draft portion of the Proposed Division II was completed, it was presented to and thoroughly reviewed by the Procurement Revision Review Committee with the Honorable Alan M. Wilner serving as Chairman. Other members of that Committee were Lewis J. Baker, Esquire, Allan B. Blumberg, Esquire, Judson P. Garrett, Jr., Esquire, and the Honorable William S. James.

In preparing Proposed Division II, the Procurement Revision Review Committee received help from numerous assistant attorneys general, officials and employees of State, county and municipal agencies, and others from the private sector. These individuals explained provisions, advised about administrative practices, provided valuable insights, reviewed drafts, and participated in Committee meetings. Although space does not permit listing the names of all of them, the Committee and its staff are indebted to these individuals and thank them.

## VI. NECESSARY MODIFICATION.

The following is a representative sample of the changes proposed by the Committee as part of the enactment of Proposed Division II of the State Finance and Procurement Article. All references to page numbers in House Bill 1 refer to the First Reading File copy of the bill.

### A. Unnecessary provisions.

Some current statutory language is surplusage. Such language includes unused definitions and provisions that are redundant. An example of a definition that is deleted as surplusage is existing SF § 11-101(bb), which defines "procurement agency head" as "the head of a procurement agency".

#### B. Obsolete provisions.

Some statutory language becomes obsolete with time, and where appropriate, the Committee has changed it to conform to current use. For example, existing SF § 11-210(b) refers to the "State Law Department". As the Revisor's Note to proposed § 11-205 explains, this reference has been changed to "the Office of the Attorney General".

In other instances, the obsolete language need not be retained. Thus, SF § 11-136.2, which provides for escrow accounts for the Department of Transportation, is deleted since, by operation of law, the provision expires before the effective date of the proposed revision.

#### C. Unintentionally vague or ambiguous provisions.

Some existing language is troublesome because it is vague or ambiguous. An example of such language can be found in present SF § 11-142(c)(1), where a reference is made to "the above-mentioned institutions". As the Revisor's Note to proposed § 14-107 explains, the Committee substituted a more accurate reference to the vague existing language.

#### D. Gaps and omissions.

Occasionally, the Committee encountered gaps in the existing law created by unintended omissions and filled them in a manner consistent with apparent legislative intent. For example, existing SF § 12-313, which creates an Advisory Council on Prevailing Wage Rate, states that members shall serve 3-year terms, but neglects to provide for the period between the time that a member's term expires and a successor is appointed and qualifies. As the Revisor's Note to proposed § 17-203 explains, the Committee added the provision that "at the end of a term, a member continues to serve until a successor is appointed and qualifies" to avoid gaps in membership.

### VII. GENERAL ISSUES.

#### A. Governmental units.

The present law contains numerous lists such as "departments, boards, commissions, and other units" or uses terms such as "State agencies" to encompass the listed entities. Throughout Proposed Division II, the word "unit" is substituted as a general term for a governmental organization and, where appropriate, an entity in the Executive Branch of the State government.

### **B. Regulations.**

Throughout Proposed Division II, the word "regulation" is substituted for "rule" or "rules and regulations" in the context of units of the Executive Branch. The term "rule" appears in the context of legislative or judicial rules.

### **C. Article 1.**

The rules of interpretation contained in Article 1 of the Annotated Code have been followed throughout Proposed Division II. These rules include definitions of "county", "includes", "including", and "may not".

### **D. Boards, Committees, and Councils.**

If existing law allows, statutes creating units such as boards, committees, and councils have been revised to reflect uniformity in organization and language. Any qualifying or unique provision of the existing law, however, has been retained in the revision.

## **VIII. DISCUSSION OF TITLES 11 THROUGH 17.**

### **A. Title 11. Definitions; General Provisions.**

#### **1. Subtitle 1 — Definitions.**

This first subtitle of Proposed Division II contains 21 definitions that apply throughout the Division unless the context clearly requires a different meaning or a different definition is provided for a particular title or provision. Nine present definitions have been deleted as unnecessary. See the Revisor's Note to § 11-101 beginning at line 30 on page 18 through line 29 on page 19.

#### **2. Subtitle 2 — General Provisions.**

Title 11, Subtitle 2 contains the statutes that relate to the purposes and scope of the general procurement law, the types of procurements that do not fall under this law, penalties for noncompliance with the general procurement law, liability for fraud in procurement, the application of procurement regulations to procurement contracts, and the requirements for determinations.

The Procurement Revision Review Committee noted that a provision of present SF § 11-103(a) is ambiguous. The provision requires the application of the general procurement law to certain procurements at a State transportation facility or State higher education facility "to the extent required by the Board [of Public Works]". Since these words could be interpreted to mean that the general procurement law applies to the specified services only if the Board expressly requires the general procurement law to apply, the Procurement Revision Review Committee substituted the words "unless exempted by the Board". See lines 25 and 26 on page 21 and the Revisor's Note beginning at line 40 on page 21 through line 9 on page 22.

**B. Title 12 -- Organization and Supervision of State Procurement.**

**1. Subtitle 1 -- State Procurement Organization.**

Title 12, Subtitle 1 of Proposed Division II contains the statutes that relate to the general authority of the Board of Public Works, its advisory bodies and staff, procurement contracts outside the United States, and the procurement authority of the State Treasurer, the Department of Budget and Fiscal Planning, the Department of General Services, the Department of Transportation, and the University of Maryland.

Present SF § 11-105(b)(1)(1) grants the Board "authority to control all procurement" and § 11-105(b)(3) permits the Board to exercise "any control authority conferred on a department". The latter reference has been changed to read "any authority over procurement", for clarity. However, the Procurement Revision Review Committee explained that the revised language in proposed § 12-101(a)(2) includes the power of the Board over debarment proceedings as well as the power to control (i.e., supervise, regulate, command, approve, or disapprove) procurement. See the Revisor's Note at lines 12 through 37 on page 30.

Present SF § 11-105(b)(1)(11), proposed § 12-104(a)(2), allows the Board to adopt regulations "in accordance with Title 10, Subtitle 1 of the State Government Article". See lines 19 and 20 on page 32. The same phrase also appears in present SF §§ 11-110(b)(2)(11), 11-128, 11-148(b)(4), 11-205(c)(1), 11-207(b), and 12-402(b). The Procurement Revision Review Committee noted that it may be more efficient to amend Title 10, Subtitle 1 of the State Government Article to state expressly that it applies to regulations adopted by the Board of Public Works.



Present SF § 11-105(b)(1)(iii) requires the Board to ensure that regulations of the "procurement departments" provide procedures that are consistent with Division II. The Procurement Revision Review Committee noted that the current law defines "procurement agency" and "department", but not "procurement department". The term "primary procurement unit" is substituted for the term "procurement department" since the provision seems to refer to the 5 units within the definition of "department" in the current law. See lines 24 and 25 on page 32 and the Revisor's Note at lines 4 through 18 on page 33.

The Procurement Revision Review Committee noted that present SF § 11-105(e)(1) is ambiguous. The provision states that "... the departments, subject to the approval of the Board, shall adopt regulations to implement all of the provisions of this Division II". It is unclear whether a regulation is valid unless it is disapproved by the Board or not valid until it is approved by the Board. A separate bill would resolve this ambiguity. See lines 31 through 33 on page 32 and the Revisor's Note at lines 19 through 24 on page 34.

Present SF § 11-106(a) provides for a member of the general public to serve on the Procurement Advisory Council. The Procurement Revision Review Committee noted that the current law does not specify who appoints this member. See line 3 on page 35 and the Revisor's Note at lines 32 through 35 on page 35.

Present SF § 11-105(d) authorizes the Department of Transportation, the Maryland Transportation Authority, and the University of Maryland to "procure"; the Department of Budget and Fiscal Planning to "control" procurement; and the State Treasurer and the Department of General Services to "procure" or "control" procurement. The revised language substitutes "engage in procurement" for "procure", to use the defined term. The Procurement Revision Review Committee noted that the law does not clarify the distinction between the terms "procure" and "control". See beginning at line 4 on page 36 through line 26 on page 37. See also the Revisor's Note at lines 28 through 37 on page 38.

Present SF § 11-105(d)(2)(iii) and (3)(ii) refers to the authority of the Department of Budget and Fiscal Planning to control "leases and rentals of automobiles" and the exclusion of "automobile leases" from the authority of the Department of General Service. The term "motor vehicle" has been substituted for the words "automobile" and "automobiles" for consistency with Title 3, Subtitle 5 of the State Finance and Procurement Article. See lines 15 and 16 and 21 through 23 on page 36 and the Revisor's Note at lines 18 through 27 on page 38.

Present SF § 11-105(e) permits the 5 units referred to, in the revision, as the primary procurement units to adopt regulations. The Procurement Revision Review Committee noted that new language has been added that reflects the practice of these units to send a copy of each proposed regulation to the Board of Public Works. See lines 2 and 3 on page 39 and the Revisor's Note at lines 9 through 13 on page 39.

2. Subtitle 2 -- Supervision of Capital Expenditures and Real Property Leases.

Title 12, Subtitle 2 contains statutes that relate to capital expenditures and to leases of real property.

The Procurement Revision Review Committee noted that present SF §§ 11-205(c)(2) and 11-208(b)(2) apparently conflict with present SF § 11-105(b)(2). Present SF § 11-208(b)(2) conditions the delegation of any power of the Board of Public Works "to approval by the Joint Committee on Administrative, Executive, and Legislative Review", and SF § 11-205(c)(2) states that regulations permitting a unit to execute or renew a lease "are subject to approval by the General Assembly, or, during the interim between sessions of the General Assembly, the Legislative Policy Committee". Present SF § 11-105(b)(2), however, grants the Board of Public Works unqualified authority to delegate power. A separate bill would make these provisions consistent. See the Revisor's Note at lines 19 through 40 on page 42 and lines 10 through 14 on page 44.

C. Title 13 -- Source Selection - State Procurement Contracts.

1. Subtitle 1 -- Methods of Source Selection.

Title 13, Subtitle 1 contains definitions and the statutes that relate to the 7 methods of source selection by a unit: competitive sealed bids, competitive sealed proposals, noncompetitive negotiation, sole source procurement, emergency procurement, expedited procurement and small procurement.

Present SF § 11-110(d) states that, if a revenue contract is awarded under the procedures for competitive sealed bids, any references, in those procedures, to "'lowest bid price' or 'lowest evaluated bid price' shall be deemed to mean the bid most favorable to the State". The Procurement Revision Review Committee added the word "financially" to modify the word "favorable" to clarify that the procurement officer is concerned about the fiscal impact of the bid rather than other aspects that can be considered in determining whether the bid is responsive or the bidder is responsible.

The reference to "competitive sealed proposals" as the preferred method for selecting contracts for the lease of real property has been substituted for the references in present §§ 11-109(b)(3) and 11-111(g) to "competitive negotiation" to conform to the language adopted by the General Assembly under Ch. 840, Acts of 1986. See the Revisor's Note at lines 35 through 41 on page 56.

Also, the vague language of present SF § 11-111(g)(5)(11), which states that "[i]f the request for proposals notifies all offerors, negotiations by the procurement officer need not be conducted", is replaced with more specific language. See lines 17 through 21 on page 55 and the Revisor's Note at lines 30 through 34 on page 56.

## 2. Subtitle 2 -- Procedural Requirements.

Title 13, Subtitle 2 contains the statutes that relate the mandatory and discretionary procedures that a unit follows in awarding a procurement contract.

Subtitle 2 is divided into 3 parts. Part I contains a definition section, which defines terms applicable throughout the subtitle. Part II contains the general procedures that apply to the various methods of source selection. Part III contains provisions on contract formation, including pricing, cost-reimbursement contracts, security for payment and performance, multi-year procurement contracts, required contract clauses, and required disclosures.

Present SF § 11-125(a), prohibits a cost-reimbursement contract unless it is otherwise impracticable to obtain the "supplies, services, construction related services, architectural services, engineering services, or construction". The Procurement Revision Review Committee substituted the defined term "procurement" for that enumeration but noted that the substituted term includes a lease of property. The General Assembly may wish to add a specific prohibition against cost-reimbursement contracts for leases if, in fact, the omission of those leases in the current law is intended to suggest such a prohibition. See lines 16 through 18 on page 72 and the Revisor's Note at lines 9 through 21 on page 73.

Present SF § 11-122(a)(2) allows termination of a procurement contract for the convenience of the State when "the department head" determines termination to be appropriate. The Procurement Revision Review Committee noted that this determination is not limited to the head of the "department"—revised as the "primary procurement unit"—that has jurisdiction over the procurement or, as is sometimes the practice, to the head of the unit that entered into the procurement contract. See lines 23 through 25 on page 76 and the Revisor's Note beginning at line 36 on page 77 through line 6 on page 78.

Present SF § 11-209(b) provides that failure to include a nondiscrimination clause in a contract renders the contract "void ab initio at the election of the State". The revision substitutes the words "voidable by the State" for that phrase. See line 1 on page 79 and the Revisor's Note at lines 13 through 16 on page 80.

Present SF § 11-214(a) requires a business to disclose information, including the name and address of each officer of a business, after entering into contracts with the State that entitle the business to receive \$100,000 or more. The Procurement Revision Review Committee noted that the word "officer" is not broad enough to include a partner in a partnership. A separate bill adding the words "or partner" in the provision would resolve the problem. See line 6 and the Revisor's Note at lines 32 through 37 on page 83.

### 3. Subtitle 3 — Architectural and Engineering Service.

Title 13, Subtitle 3 contains definitions and other statutory provisions that relate to the organization and function of the General Professional Services Selection Board and the Transportation Professional Services Selection Board.

Present SF §§ 11-152(c)(2) and 11-170(c)(2) prohibit a member of the General Selection Board or Transportation Selection Board from participating in a matter before the Board if the member has been "associated with" a person who has an interest in a matter before the Selection Board. That language may be inconsistent with the Maryland Public Ethics Law. See the Revisor's Note at lines 8 through 34 on page 88 and lines 32 through 39 on page 90.

Present SF § 11-173(c) requires certification that "in-house resources" are insufficient to provide requested architectural or engineering services feasibly or economically. The Procurement Revision Review Committee substituted a reference to resources of the Department of General Services. See lines 21 through 26 on page 92 and the Revisor's Note at lines 16 through 26 on page 93 and lines 34 through 37 on page 93 and the Revisor's Note at lines 17 through 21 on page 94.

Present SF §§ 11-157(b)(1)(11) and 11-175(b)(1)(11) require a waiver of certain procedures for selecting architectural or engineering services after a natural disaster occurs in which public health and safety are endangered. This thought seems to be implicit in another provision that requires a waiver when the Governor declares an emergency. A separate bill delating revised § 13-314(a)(3) would resolve this redundancy. See lines 19 and 20 on page 101 and the Revisor's Note at lines 31 through 42 on page 102.

Present SF §§ 11-158(a) and 11-176(a) require the Selection Board to send its recommendation on a contractor to the Board of Public Works. The Procurement Committee noted that the law fails to state that the Board of Public Works has the authority to approve, reject, or remand the recommendation. A separate bill adding this language would fill this gap in the law. See the Revisor's Note at lines 1 through 8 on page 104.

Present SF § 11-137(g) provides the procedure for appeals from recommendations by the Selection Board to the Board of Public Works. The word "shall" has been substituted for the word "may" to clarify that the Board of Public Works is required to either approve the recommendation, disapprove the recommendation, or remand the matter to the Selection Board. See lines 20 through 23 and the Revisor's Note at lines 28 through 32 on page 104.

#### **D. Title 14 — Preferences.**

##### **1. Subtitle 1 — Preferences to Benefit Disadvantaged Individuals.**

Title 14, Subtitle 1 contains the statutes that relate to the priority of preferences used by State aided or controlled entities, the creation and authority of the Blind Industries and Services Pricing Committee, and the Pricing and Selection Committee for Rehabilitation and Employment Centers.

Present SF § 11-142(a)(1) and (2) refers to supplies and services supplied by "the Department of Public Safety and Correctional Services". References to "State Use Industries" have been substituted since the Department only provides supplies or services through State Use Industries. See lines 28 and 29 and line 33 on page 112 and the Revisor's Note at lines 24 through 31 on page 113.

The Procurement Revision Review Committee noted that present SF §§ 11-141(c)(2)(iv) and 11-143 contain obsolete references to the "Executive Vice President" of Blind Industries and Services of Maryland. Since there is no such official, references to the "President of Blind Industries and Services of Maryland [or designee of the President]" have been substituted. See lines 9 and 10 on page 114 and the Revisor's Note at lines 1 through 6 on page 115 and lines 4 and 25 on page 116, and the Revisor's Note at lines 31 through 36 on page 117.

Also, references to "Maryland Rehabilitation and Employment Association, Inc.", have been substituted for the obsolete references in present SF § 11-141(c)(2)(1) and (3) to the "Maryland Association of Workshops, Inc[.]". See lines 26 and 27 on page 116 and the Revisor's Note at lines 37 through 41 on page 117 and line 42 on page 118 and the Revisor's Note at lines 6 through 10 on page 119.

## 2. Subtitle 2 -- Small Business Preference Program.

Title 14, Subtitle 2 contains statutes that relate to the Small Business Preference Program for procurements by the Department of General Services, the Department of Transportation, and the University of Maryland. The subtitle includes the duties of the Department of Economic and Employment Development, percentage preferences, special procedures for source selection, and annual reports concerning the program.

## 3. Subtitle 3 -- Minority Business Participation.

Title 14, Subtitle 3 contains definitions and other statutory provisions that relate to procurement from minority businesses, including required regulations, contents of annual reports by units under this subtitle, duties of the Governor's Office of Minority Affairs and of the Legislative Policy Committee, and prohibited acts and penalties.

## 4. Subtitle 4 -- Miscellaneous Purchasing Preferences.

Title 14, Subtitle 4 contains statutes that relate to a reciprocal preference for resident bidders, the purchase of recycled paper and low noise supplies, and use of coal.

Present SF § 11-148.6(c) requires a building or facility that is designed after July 1, 1986 and uses coal for heat to have a heating system that accommodates Maryland coal. The Procurement Revision Review Committee noted that it is unclear whether the law applies to a building or facility that was designed before July 1, 1986 but constructed after that date or to a building or facility for which a bid was accepted before July 1, 1986. A separate bill would resolve this ambiguity. See lines 30 through 36 on page 136 and the Revisor's Note at lines 1 through 7 on page 137.

5. Subtitle 5 — Purchases from the Republic of South Africa.

Title 14, Subtitle 5 contains a definition and other statutory provisions that relate to restrictions applicable to bidders or offerors for State procurement contracts doing business with or in the Republic of South Africa.

The Procurement Revision Review Committee noted that present SF § 11-148.5 requires the State to provide "ample notice of the requirements of this subtitle". The word "ample" has been deleted as meaningless and without legal effect. See lines 29 and 30 and the Revisor's Note at lines 37 through 41 on page 139.

E. Title 15 -- Procurement Contract Administration and Dispute Resolution.

1. Subtitle 1 — Procurement Contract Administration.

Title 15, Subtitle 1 contains one definition and other statutory provisions that relate to information required in invoices, payment by the State under procurement contracts, interest on late payments, escrow of retainage, inspections, audits, reports, and disputes among units.

Present SF § 11-136, requires the Governor to resolve disputes among units concerning responsibility for a delay in payment under a procurement contract. The Procurement Revision Review Committee noted that this provision is meaningless since no sanction is imposed against the unit responsible for the delay. A separate bill that either repeals revised § 15-106 or adds a sanction would resolve this problem. See lines 16 through 18 and the Revisor's Note at lines 22 through 27 on page 143.

Present SF § 11-131(a) requires each department—now primary procurement units—to report to the Governor and the General Assembly on sole source, emergency, and expedited procurements. That report must describe the "supplies, services, construction, or construction related services procured or real property leased". Although the law does not make specific reference to "architectural" or "engineering" services, the omission seemed inadvertent. Thus the revised language requires the report to include a description of the "procurement".

## 2. Subtitle 2 -- Dispute Resolution.

Title 15, Subtitle 2 contains the statutes that relate to appeal procedures and the Maryland State Board of Contract Appeals, which has jurisdiction to hear and decide appeals from decisions by units concerning protests and contract claims.

This subtitle is divided into 3 parts. Part I contains definition and scope of subtitle sections. Part II contains the statutes that relate to the organization and function of the Maryland State Board of Contract Appeals. Part III contains the statutes that relate to procedures for dispute resolution.

Present SP § 11-137(b)(1) refers to regulations concerning the filing of protests as "regulations adopted by the appropriate department". The Procurement Revision Review Committee noted that since, in practice, the Board of Public Works adopts regulations concerning the filing of protests, the reference to "regulations of the Board" has been substituted. See lines 16 and 17 and the Revisor's Note at lines 29 through 40 on page 155.

The Procurement Revision Review Committee noted that present SP § 11-137(d)(2) in part allows the reviewing authority to remand a complaint "with appropriate instructions, to the procurement officer who shall proceed ... ." The words "in accordance with those instructions" have been added after the word "proceed" to clarify the manner in which the procurement officer shall proceed. See lines 12 and 13 on page 157 and the Revisor's Note at lines 6 through 12 on page 158.

Present SP § 11-137(f)(2) expressly excepts "complaints relating to real property leases that have been entered into" from the time limit for filing an appeal. The Procurement Revision Review Committee noted that this exception has been revised to state expressly what the present law only implies, i.e., that the Appeals Board does not have jurisdiction over contract claims relating to real property leases. See lines 23 through 26 on page 159 and the Revisor's Note at lines 1 through 12 on page 160.

## F. Title 16 -- Debarment of Contractors.

### 1. Subtitle 1 -- Debarment for Offenses Other Than Bribery.

Title 16, Subtitle 1 contains definitions and other statutory provisions that relate to grounds for debarment of contractors for certain statutory offenses.



The Procurement Revision Review Committee noted that this subtitle does not include procedural provisions, unlike Subtitle 2, which includes provisions concerning notice, investigation, and hearing for debarment for bribery related offenses. The procedural provisions for debarment under Subtitle 1 are contained in the regulations of the Board of Public Works. Since both subtitles provide for debarment, the same procedural provisions should apply to avoid confusion and inconsistent treatment of persons subject to debarment. A separate bill would provide for the same procedures for debarment under either subtitle. See the General Revisor's Note at lines 7 through 22 on page 177.

Present SF § 11-211(1) imposes on each "State agency" a duty to forward to the Board information that relates to offenses for which contractor's may be debarred. The Procurement Revision Review Committee noted that SF § 11-101(jj) defines "State agency" but only for purposes of present §§ 11-101 through 11-184. Thus, technically, the definition is not applicable to present SF § 11-211(1). The Committee believed, however, that the term may have been used in present SF § 11-211(1) on the mistaken assumption that the definition applied. Therefore, the new defined term "unit" has been substituted for "State agency". See lines 36 through 38 on page 166 and lines 1 through 12 on page 167.

Present SF § 11-212 prohibits the State from awarding a procurement contract to a person found in contempt of court for failure to correct unfair labor practices. That section has been deleted in light of an opinion of the Attorney General that determined that it is unconstitutional. See the General Revisor's Note at lines 1 through 23 on page 168.

## 2. Subtitle 2 — Debarment from State and Local Contracts-- Bribery.

Title 16, Subtitle 2 contains the definitions and other statutory provisions that relate to debarment procedures for a person who has been convicted of bribery or offenses related to bribery.

Present SF § 12-109 prohibits a public body from entering into "any procurement contract" with persons debarred for bribery. The qualifying word "procurement" has been deleted since, in the Revision, the term is limited to contracts made by units of the Executive Branch of the State government. Under the present law, this limiting definition is not applicable, and the deletion avoids inadvertently limiting the scope of this provision.

Present SF § 12-109 also refers to a contract for "supplies, services, or construction, of any kind or nature". Under the revision, definitions of "supplies", "services", and "construction" that, in the present law, apply only to §§ 11-101 through 11-184 have been made generally applicable throughout Division II. Since, however, the term "services" is defined to exclude "architectural services", "construction related services", and "engineering services", specific references to these types of services are added in revised § 16-208 to retain the scope implicit in the present reference to "services ...of any kind or nature". See lines 10 through 14 and the Revisor's Note at lines 17 through 36 on page 176.

G. Title 17 -- Special Provisions--State and Local Subdivisions.

1. Subtitle 1 -- Security for Construction Contracts.

Title 17, Subtitle 1 contains definitions and other statutory provisions that relate to payment security and performance security required for certain construction contracts. This subtitle may be cited as the Maryland Little Miller Act.

The Procurement Revision Review Committee noted that present SF § 12-201(a)(2) implies that a political subdivision may not require a performance or payment security for a construction contract if the price of the contract is \$25,000 or less. At least 14 counties, however, do require security for contracts under \$25,000. A separate bill expressly stating whether security may be required for contracts under \$25,000 would resolve this ambiguity. See the Revisor's Note at lines 15 through 30 on page 180.

2. Subtitle 2 -- Prevailing Wage Rates -- Public Work Contracts.

Title 17, Subtitle 2 contains the definitions and other statutory provisions that relate to the procedures for the determination, regulation, and appeal of prevailing wage rates.

This subtitle is divided into 3 parts. Part I contains the definitions and statutes related to the organization and general authority of the Advisory Council on Prevailing Wage Rates and the duties of the Commissioner of Labor and Industry. Part II contains statutes relating to the determination of prevailing wage rates, requirements for soliciting bids or proposals, review of prevailing wage rate determinations, and payment of prevailing wage rates. Part III contains statutes related to administrative and enforcement procedures.

Present SF § 12-313(b) requires the Commissioner to submit an annual report "on or before the first day of January" covering activities "for the preceding calendar year". The Procurement Revision Review Committee noted that, if the reference to "the preceding calendar year" describes the year preceding the date on which the report is due, the Commissioner should be given a reasonable time to prepare the report. See lines 40 and 41 on page 195 and the Revisor's Note at lines 17 through 26 on page 196.

### 3. Subtitle 3 — Steel Procurement for Public Works.

Title 17, Subtitle 3 contains the definitions and other statutory provisions that relate to the purchase of steel. This subtitle may be cited as the "Maryland Buy American Steel Act".

The Procurement Revision Review Committee noted that the reference, in present SF § 12-404, to federal "regulation" has been changed to refer to a "federal law" to include Congressional legislation that affects a contract. See lines 42 and 43 on page 219 and the Revisor's Note at lines 4 through 8 on page 220.

Present SF § 12-403 states that payments made to a person who violates provisions of this subtitle may be recovered "to the full extent of the contract". The Procurement Revision Review Committee noted that this phrase is ambiguous, since it may be interpreted to mean that the State is entitled to recover payment even for the work under a contract that has been performed satisfactorily. A separate bill, expressly stating that the State may not recover a payment made for work satisfactorily performed, would resolve this ambiguity. See lines 8 and 9 and the Revisor's Note at lines 21 through 33 on page 222.

### B. Miscellaneous Provisions.

Present SF § 11-206 requires the Board of Public Works to supervise expenditures for the acquisition of land. Present SF § 11-207 requires 2 independent appraisals before real property is acquired. Since the acquisition of real property does not constitute a "procurement", those 2 provisions are transferred to Title 4, Subtitle 4, Part III of the State Finance and Procurement Article. That Part III contains the statutes related to the Division of Land Acquisition of the Department of General Services.

Chapter 840, Acts of 1986, deleted the defined term "using agency" but failed to correct a cross reference to that term in SF § 4-301(d). To correct the oversight, SF § 4-301(d) has been deleted, and the substance of the former definition has been incorporated in SF §§ 4-304(a)(1) and (2), 4-306(a) and (b)(1) and (2), 4-307, 4-310, 4-311, 4-312, 4-313, 4-314, and 4-315 by references such as "a unit that procures supplies under Division II of this article." See, e.g., the Revisor's Note at lines 22 through 40 on page 3.

That former definition also had been used, inadvertently, in SF § 4-412(b), although technically, the definition applied only to SF §§ 4-301 through 4-321 and was narrower than former Art. 78A, § 19A(a), from which § 4-412(b) was derived. To correct this error, references such as "unit of the State government" have been substituted for "using agency".

Respectfully submitted,



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